

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA DE LA LUZ GUZMAN-LEPE
Claimant

VS.

NATIONAL BEEF PACKING COMPANY
Respondent

AND

NATIONWIDE AGRIBUSINESS INS. CO.
LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

Docket No. 248,456

ORDER

Claimant requested review of the October 16, 2009 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on January 20, 2010.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Shirla R. McQueen, Liberal Kansas, appeared for respondent and its insurance carrier Nationwide Agribusiness Insurance Company (Nationwide). Terry Malone, of Dodge City, Kansas, appeared for respondent and Liberty Mutual Insurance Company (Liberty).¹

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

¹ Liberty was respondent's insurance carrier from September 1, 2001 to August 31, 2002, which covers the last day the claimant worked for respondent. (ALJ Order (Oct. 16, 2009) at 2).

ISSUES

The ALJ adopted the opinions expressed by Dr. Murati and assigned a 1 percent permanent partial disability as a result of claimant's October 14, 1999 accident. Although claimant was no longer employed, the ALJ found that it was claimant's restrictions to her upper extremities (a result of an earlier injury with this employer) which precluded any further employment with respondent. And because respondent could have accommodated claimant's low back restrictions and allowed her to continue working, the ALJ determined claimant was not entitled to a greater award based upon permanent partial general (work) disability under K.S.A. 44-510e(a).

The claimant requests review of this decision alleging the Award should be modified. Claimant maintains she is permanently and totally disabled as a result of her October 14, 1999 injury. In the alternative, she contends the ALJ's Award should be modified to reflect a permanent partial general (work) disability which takes into consideration *all* of claimant's restrictions, not just those relative to her low back, as well as her actual wage loss as required by *Bergstrom*.² In doing so, claimant argues the Award should be modified to reflect her actual 100 percent wage loss and a task loss of 8 - 54 percent (depending on which physicians' task loss is utilized). If just the restrictions on the back are considered, claimant advocates a finding of a 15 percent task loss, which when averaged with her 100 percent wage loss would yield a 57.5 percent work disability.

Respondent and both carriers (Nationwide and Liberty) maintain the ALJ's Award should be affirmed in all respects. They argue that claimant is not entitled to a work disability award because the reason she cannot work is due to earlier injuries to her upper extremities or other subsequent injuries and those claims have been settled. Thus, *Bergstrom* is inapplicable and she is limited to the 1 percent functional impairment assigned by the ALJ. Alternatively, respondent and Nationwide contend that to the extent claimant has a work disability, her injuries are the result of repetitive work duties commencing October 14, 1999 and continuing until March 15, 2002, her last date of work for respondent. Thus, based on that date of accident Liberty would be the appropriate carrier to satisfy claimant's award, not Nationwide.

Respondent and Liberty additionally contend the Award should also be affirmed as to the finding that it is not responsible for benefits in this matter. In other words, respondent and Liberty agree with the ALJ's finding that claimant's accident was a single acute injury occurring on October 14, 1999 and on that date, Liberty had no liability as it had yet to assume coverage.

² *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out the facts and circumstances surrounding this claim that are detailed, accurate, and supported by the record. Accordingly, the Board finds it is not necessary to repeat those findings in this order. Therefore, the Board adopts the ALJ's factual recitation as its own as if specifically set forth herein and will only reference those facts necessary to explain its decision.

Claimant was employed by respondent in various positions and over the course of her time as an employee suffered no less than 9 injuries for which a separate docketed claim was made for each.³ Aside from this docketed claim, each of those other claims have been fully and finally compromised and settled. One of those claims involved a bilateral upper extremity injury.

This claim involves solely claimant's acute injury which occurred on October 14, 1999 when a forklift struck her in the back causing her immediate pain from the waist down. She was provided treatment on site and later referred to Dr. Pedro Murati, who treated her conservatively with pain medications and injections. Dr. Murati initially diagnosed lumbosacral strain, left SI joint dysfunction, left knee and left ankle pain with crepitus.⁴

Unfortunately, none of this treatment seemed to provide her with any meaningful relief. She was released from Dr. Murati's care in April 2001. At that point he gave her a final diagnosis of probable lumbar radiculopathy, patellofemoral syndrome of the left knee

³ Docket 237,172 --Date of accident 6/15/98 - left shoulder/chest wall strain and left rib fracture.
Docket 241,649 -- Date of accident 8/8/98 - upper back contusion
Docket 237,139 -- Date of accident 9/1/98 - repetitive injury to right upper extremity and upper back
Docket 245,453 -- Date of accident 5/22/99 - left leg
Docket 248,456 -- Dated of accident **10/14/99 - back, right hip, left lower leg, left foot, left ankle**
Docket 261,909 -- Date of accident 11/6/00 - left hand/left arm
Docket 261,910 -- Date of accident 12/4/00 - right hand
Docket 268,149 -- Dated of accident 5/29/01 - right arm and contusion/abrasion to both knees
Docket 268,150 -- Date of accident 7/12/01 - left knee and contusion/abrasion

⁴ Murati Depo., Ex. 2 at 20 (Nov. 9, 1999 office note).

with crepitus and left ankle pain with crepitus.⁵ He assigned permanent restrictions⁶ which respondent was able to accommodate and she continued to work for a period of time, working both the “combo bin temp” job and later a job in the paint and clean up department.

Dr. Murati assigned a 1 percent permanent partial impairment to the whole body for her complaints to her low back and the left lower extremity. When asked if he could explain how he arrived at that number and what portion of the 1 percent was attributable to any given portion of the body, he was unable to do so.⁷ He opined that claimant had sustained at least some small percentage of impairment to her back. He was also asked the following question:

Q. Okay. Now, I am going to tell you, Dr. Murati, that the record for Miss Guzman claims that she claimed numerous other accidents which resulted in injury [in] 1998 and 2002. And I will also tell you that once she was released by you she did not obtain or seek any further treatment to her back. Now, the record is also going to reflect that Miss Guzman saw Dr. Reiff Brown on December 13, '01 and made no complaints of back pain. And on May 14, '03, she made no complaint of back pain. But that her first complaint of back pain to Dr. Brown was in May of 2004; but again, that she had not worked for National Beef since April of 2002. So given this history, can you attribute Miss Guzman's complaint of back pain in May of 2004 to her October 14, 2000, accident.

MR. AUSEMUS: I will object to that as any answer being given there would be totally speculative inasmuch as this doctor has not seen this person for almost eight years.

Q: You may answer.

A: Well, if the facts are correct, that it took, that there was a three year hiatus between any treatment to the back and complaints to the back, I don't think you could reasonably attribute it to this injury that we are talking about.⁸

In December 2001, Dr. Reiff Brown, a physician who had been treating some of claimant's earlier work-related injuries, issued restrictions relative to claimant's upper extremity injuries which limited her ability to reach in excess of 14 inches beyond her body. That report eventually found its way to respondent's human resources department on

⁵ *Id.*, Ex. 2 at 1 (Apr. 24, 2001 office note).

⁶ Lifting up to 10 pounds continuously, up to 20 pounds frequently, up to 40 pounds occasionally, no crawling, occasional kneeling, bending and stooping.

⁷ Murati Depo. at 8.

⁸ Murati Depo. at 8-9

March 12, 2002. Respondent concluded it was ultimately unable to accommodate those restrictions imposed and claimant was placed on a long-term leave of absence.

When deposed for purposes of this litigation, Dr. Brown confirmed that he had seen claimant as far back as 2001 and then again in 2003 and 2004 for various complaints. He further confirmed that claimant did not disclose the forklift accident to him until 2004 and that her first complaint of back pain came in May 2004. By this time (2004) claimant had not been working for respondent for over 2 years and had received no medical treatment for her back or leg complaints. When asked by claimant's counsel if there was something about her work activities that would serve as a "triggering mechanism" to claimant's degenerative problems in her back, he replied "[w]ell, apparently it was a forklift incident." He went on to agree in the deposition that the forklift accident would have served as an aggravation of her preexisting degenerative condition.⁹

Although respondent and Nationwide contend claimant's accident was a repetitive injury rather than a single acute injury, the medical evidence does not support that contention. Moreover, the parties stipulated that claimant's accident date was October 14, 1999.¹⁰ Thus, the ALJ's finding that respondent and its carrier Nationwide are liable for this Award and that Liberty is dismissed from this claim is affirmed.

At the time of her October 1999 accident claimant was working the "combo bin temp" job, a position that was within the restrictions imposed by Dr. Murati *as a result of one of her earlier injuries*. She continued to do that job after her October 14, 1999 injury up until June 29, or 30, 2000 when claimant was transferred to a light duty position in the paint/cleanup department.

It is somewhat unclear from the record whether claimant's transfer was due to a reassignment of the "combo bin temp" duties or due to the respondent's receipt of additional restrictions from one of claimant's other injuries. It is clear, however, that claimant was released by Dr. Murati on April 21, 2001 with permanent restrictions and that she received no further treatment to her back, nor did she make any low back complaints to Dr. Brown until much later. On March 12, 2002, Dr. Brown issued a series of restrictions for both claimant's upper extremities (which were the focus of earlier claim(s)). As a result of these restrictions, respondent could no longer accommodate all of claimant's conditions and she was placed on a long-term leave of absence. According to respondent, it was the limit on claimant's ability to reach away from her body over 14 inches that precluded an accommodation. Other than that restriction, respondent would have otherwise been able to accommodate claimant's restrictions for her low back.¹¹

⁹ Brown Depo. at 37.

¹⁰ ALJ Award (Oct. 16, 2009) at 2.

¹¹ Williams Depo. (Aug. 14, 2009) at 16-17.

Although two physicians have weighed in on claimant's permanent impairment, and the ALJ was persuaded by the opinions offered by Dr. Murati, the Board is required to perform a *de novo* review of the evidence.¹² And after carefully considering all of the medical testimony, the Board finds that the ALJ's Award should be modified.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹⁴ Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.¹⁵ Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.¹⁶

The Board concludes that while claimant sustained an accidental injury arising out of and in the course of her employment on October 14, 1999, it does not find that claimant sustained permanent impairment as a result of that injury. Rather, the greater weight of the evidence suggests that claimant sustained a temporary injury and a temporary aggravation of a preexisting degenerative back condition as a result of the accident. This conclusion is supported by the testimony of both Drs. Murati and Brown. Dr. Murati's testimony that he could not relate her low back complaints and the resulting permanent impairment to the 1999 accident is persuasive. Claimant had a constellation of complaints that did not seem to improve, regardless of her treatment. And although he assigned her a permanent impairment, he was unable to ascertain what portion of that impairment related to the back or the lower extremity. Similarly, Dr. Brown testified that in spite of numerous office visits to him over the years, claimant did not voice any complaints of low back pain until May 2004. And she did not disclose the 1999 forklift event to him until 2004. Thus, while claimant most certainly sustained injury on October 14, 1999, the greater weight of the evidence supports the Board's conclusion that she did not sustain anything more than a temporary injury and/or temporary aggravation of symptoms. Thus, the Board finds she is entitled to no permanent partial disability benefits, either for a functional impairment or an award greater than the functional impairment under K.S.A. 44-510e(a).

¹² K.S.A. 1999 Supp. 44-555c(a).

¹³ K.S.A. 1999 Supp. 44-501(a).

¹⁴ K.S.A. 1999 Supp. 44-508(g).

¹⁵ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258, (1999).

In light of the foregoing conclusion, there is no need to address claimant's allegation that she is permanently and totally disabled as a result of the injury under K.S.A. 44-510c.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated October 16, 2009, is modified as follows:

The claimant is entitled to an award against respondent and its carrier Nationwide for 4.15 weeks of temporary total disability compensation at the rate of \$300.92 per week or \$1,248.82, which is ordered paid in one lump sum less amounts previously paid. Nationwide is also responsible for the medical expenses associated with this claim.

Claimant is also entitled to unauthorized medical not to exceed \$500.00 and future medical treatment only upon proper application to and approval by the Director of Workers Compensation.

IT IS SO ORDERED.

Dated this _____ day of February 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Shirla R. McQueen, Attorney for Resp. and Nationwide Agribusiness Ins. Co.
Terry Malone, Attorney for Respondent and Liberty Mutual Insurance Company.
Pamela J. Fuller, Administrative Law Judge